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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MALEN J. MARULLI,) Civil No. 09-0903-MMA(WVG)
12)
13 Plaintiff,) REPORT AND RECOMMENDATION
14) GRANTING DEFENDANT'S MOTION
15 v.) TO DISMISS AND DENYING
16) PLAINTIFF'S MOTION TO DISMISS
17 MICHAEL J. ASTRUE, Commissioner)
18 of Social Security,)
19) (Doc. Nos. 18, 20)
20 Defendant.)
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18 On April 29, 2009, Plaintiff Malen J. Marulli (hereafter
19 "Plaintiff"), filed a Complaint For Judicial Review And Remedy On
20 Administrative Decision Under The Social Security Act [42 U.S.C.
21 §405(g)]. On August 3, 2009, Defendant Michael J. Astrue (hereafter
22 "Defendant"), filed an Answer to the Complaint and the administra-
23 tive record (hereafter "Record" or "Tr."), pertaining to this case.
24 Plaintiff has filed a Motion for Summary Judgment. Defendant has
25 filed an Opposition to Plaintiff's Motion for Summary Judgment and
26 a Cross-Motion for Summary Judgment.

27 The Court, having reviewed Plaintiff's Motion for Summary
28 Judgment, Defendant's Opposition to Plaintiff's Motion for Summary

1 Judgment, Defendant's Cross-Motion for Summary Judgment and the
2 Record filed by Defendant, hereby finds that Plaintiff is not
3 entitled to the relief requested and therefore RECOMMENDS that
4 Defendant's Motion for Summary Judgment be GRANTED and Plaintiff's
5 Motion for Summary Judgment be DENIED.

6 I

7 STATEMENT OF FACTS

8 Plaintiff was born on October 3, 1941. (Tr. 17, 22, 593,
9 701). She has had past relevant work experience as a customer
10 service representative, answering service operator and retail
11 clerk/cashier. (Tr. 17, 594, 701). Plaintiff alleges that she
12 suffers from a disability as of January 3, 2003 due to chronic
13 obstructive pulmonary disease, diabetes mellitus, non-alcohol
14 related cirrhosis, status post carpal tunnel surgery, hypothyroid,
15 urinary incontinence, umbilical hernia, and history of early
16 Alzheimer's Disease, inability to sit or stand for significant
17 periods of time, and limited use of her right arm.

18 II

19 PROCEDURAL HISTORY

20 On February 11, 2005, Plaintiff filed applications for
21 disability insurance benefits and supplemental Social Security
22 income. (Tr. 271-273, 695-697). The Commissioner of Social Security
23 denied her applications. (Tr. 241-242). Thereafter, Plaintiff
24 requested a hearing. On February 9, 2006, Plaintiff appeared and
25 testified before Administrative Law Judge (hereafter "ALJ") Larry
26 Parker. (Tr. 589-614). On June 30, 2006, ALJ Parker found that
27 Plaintiff was disabled as of February 2, 2005. (Tr. 12-21).

1 The Appeals Council denied Plaintiff's request for review of the
2 ALJ's decision. (Tr. 7-8).

3 On April 13, 2007, Plaintiff filed an action in this Court.
4 On April 22, 2008, the Court remanded the case to the ALJ for
5 further proceedings. [07-0670-JLS(NLS), Docket Nos. 1, 22, Tr. 645-
6 653].

7 On December 1, 2008, ALJ Parker held another hearing pursuant
8 to the Court's remand. The purpose of the hearing was for the ALJ to
9 determine whether Plaintiff was disabled from her alleged onset date
10 of January 3, 2003 to February 1, 2005. Plaintiff testified at the
11 hearing. (Tr. 698-715). On January 5, 2009, the ALJ found that
12 Plaintiff was not disabled during the time period noted above. (Tr.
13 615-628). The ALJ's decision became the Commissioner's final
14 decision.

15 On April 29, 2009, Plaintiff filed this action. On August 3,
16 2009, Defendant filed an Answer and the administrative record
17 pertaining to this case. On January 5, 2010, Plaintiff filed a
18 Motion for Summary Judgment. On February 5, 2010, Defendant filed
19 an Opposition to Plaintiff's Motion for Summary Judgment and a
20 Cross-Motion for Summary Judgment.

21 III

22 SUMMARY OF APPLICABLE LAW

23 Title II of the Social Security Act (hereinafter "Act"), as
24 amended, provides for the payment of insurance benefits to persons
25 who have contributed to the program and who suffer from a physical
26 or mental disability. 42 U.S.C. § 423 (a)(1)(D). Title XVI of the
27 Act provides for the payment of disability benefits to indigent
28 persons under the Supplemental Security Income (SSI) program. § 1382

1 (a). Both titles of the Act define "disability as the "inability to
2 engage in any substantial gainful activity by reason of any
3 medically determinable physical or mental impairment which can be
4 expected to last for a continuous period of not less than 12
5 months..." Id. The Act further provides that an individual:

6 shall be determined to be under a disability only if
7 his physical or mental impairment or impairments are
8 of such severity that he is not only unable to do his
9 previous work but cannot, considering his age,
10 education, and work experience, engage in any other
11 kind of substantial gainful work which exists in the
12 national economy, regardless of whether such work
13 exists in the immediate area in which he lives, or
14 whether a specific job vacancy exists for him, or
15 whether he would be hired if he applied for work. Id.

16 The Secretary of the Social Security Administration has
17 established a five-step sequential evaluation process for determin-
18 ing whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920.
19 Step one determines whether the claimant is engaged in "substantial
20 gainful activity." If he is, disability benefits are denied. 20
21 C.F. R. §§ 404.1520(b), 416.920(b). If he is not, the decision
22 maker proceeds to step two, which determines whether the claimant
23 has a medically severe impairment or combination of impairments.
24 That determination is governed by the "severity regulation" at issue
25 in this case. The severity regulation provides in relevant part:

26 If you do not have any impairment or combination of
27 impairments which significantly limits your physical
28 or mental ability to do basic work activities, we will
find that you do not have a severe impairment and are,
therefore, not disabled. We will not consider your
age, education, and work experience. §§ 404.1520(c),
416.920(c).

29 The ability to do basic work activities is defined as "the
30 abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§
31 404.1521(b), 416.921(b). Such abilities and aptitudes include

1 "[p]hysical functions such as walking, standing, sitting, lifting,
2 pushing, pulling, reaching, carrying, or handling"; "[c]apacities
3 for seeing, hearing, and speaking"; "[u]nderstanding, carrying out,
4 and remembering simple instructions"; [u]se of judgment";
5 "[r]esponding appropriately to supervision, co-workers, and usual
6 work situations"; and "[d]ealing with changes in a routine work
7 setting." Id.

8 If the claimant does not have a severe impairment or
9 combination of impairments, the disability claim is denied.

10 If the impairment is severe, the evaluation proceeds to the
11 third step, which determines whether the impairment is equivalent to
12 one of a number of listed impairments that the Secretary acknowl-
13 edges are so severe as to preclude substantial gainful activity. 20
14 C.F.R. §§ 404.1520(d), 416.920(d). If the impairment meets or
15 equals one of the listed impairments, the claimant is conclusively
16 presumed to be disabled. If the impairment is not one that is
17 conclusively presumed to be disabling, the evaluation proceeds to
18 the fourth step, which determines whether the impairment prevents
19 the claimant from performing work he has performed in the past. If
20 the claimant is able to perform his previous work, he is not
21 disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
22 cannot perform his previous work, the fifth and final step of the
23 process determines whether he is able to perform other work in the
24 national economy in view of his age, education, and work experience.
25 The claimant is entitled to disability benefits only if he is not
26 able to perform other work. 20 C.F.R. §§ 404.1520(f), 416.920(f).

IV

ALJ'S FINDINGS

The ALJ made the following pertinent findings:

1. (Plaintiff) met the insured status requirements of the Social Security Act through December 31, 2005.

2. (Plaintiff) has not engaged in substantial gainful activity from January 3, 2003 through February 1, 2005, the relevant time period.

3. During the relevant period, (Plaintiff) had the following severe impairments: chronic obstructive pulmonary disease, diabetes mellitus, non-alcohol related cirrhosis, status post carpal surgery, hypothyroid, urinary incontinence, umbilical hernia and history of early Alzheimer's disease.

4. (Plaintiff) does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in ... 20 C.F.R. 404.1525, 404.1526, 416.925 and 416.926.

... In activities of daily living, (Plaintiff) has mild restriction.

... In social functioning, (Plaintiff) has mild difficulties.

... With regard to concentration, persistence or pace, (Plaintiff) has mild difficulties.

5. After careful consideration of the entire record, the undersigned finds that the (Plaintiff) has the residual functional capacity to perform light work as defined by 20 C.F.R. 404.1567(b) and 416.967(b). Additionally, she may use a cane but it is not required. She can only occasionally bend, stoop, crouch, crawl, kneel and climb. She can only perform frequent reaching, handling, feeling, grasping, and fingering.

In making this finding, the undersigned has considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence... The undersigned has also considered opinion evidence...

After careful consideration of the evidence, the undersigned finds that the (Plaintiff's) medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the (Plaintiff's) statements concerning the intensity, persistence and limiting effects of these symptoms are not

1 credible to the extent they are inconsistent with the
2 above residual functional capacity assessment.

3 For the relevant period set out by the Appeals Council
4 ending on February 1, 2005, I find that the (Plain-
tiff) failed to demonstrate a severe disabling
impairment or combination of impairments...

5 6. (Plaintiff) was capable of performing past
6 relevant work as an answering service operator,
customer service representative and cashier/retail.
7 This work does not require the performance of work-
related activities precluded by the (Plaintiff's)
8 residual functional capacity...

9 7. (Plaintiff) was not been (sic) under a
10 disability, as defined in the Social Security Act, at
any time prior to February 1, 2005...
(Tr. 623-628)

11 V

12 THE ALJ PROPERLY EVALUATED PLAINTIFF'S MENTAL IMPAIRMENT

13 Plaintiff argues that the ALJ should have found Plaintiff's
14 mental impairment to be severe. Plaintiff supports her argument by
15 pointing to evidence of her early Alzheimer's Disease. Defendant
16 argues that Plaintiff's argument is erroneous in that the ALJ found
17 Plaintiff's early Alzheimer's Disease to be a severe impairment.

18 The Court finds that Plaintiff's argument with regard to the
19 ALJ's assessment of her mental impairment is erroneous. While
20 Plaintiff's initially argues that the ALJ did not find her early
21 Alzheimer's Disease to be a severe impairment, she later argues that
22 the ALJ did find her early Alzheimer's Disease to be a severe
23 impairment. (Plaintiff's Memorandum of Points & Authorities in
24 Support of Motion for Summary Judgment at 4, 6, 7). In fact, the
25 ALJ found Plaintiff's early Alzheimer's Disease to be a severe
26 impairment. (Tr. 624).

27 Plaintiff also argues that the ALJ's finding that her severe
28 mental impairment caused only mild mental limitations should have

1 been included in his findings regarding her residual functioning
2 capacity (hereafter "RFC"). Defendant argues that Plaintiff's
3 contention lacks merit.

4 In Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir. 2007), the
5 Ninth Circuit Court of Appeals held that while an ALJ found the
6 claimant's mental and physical impairments to be severe, the ALJ was
7 not obligated to include the claimant's mental impairment in
8 determining the claimant's RFC. In Hoopai, the court specifically
9 noted that an ALJ's finding of a severe impairment is merely a
10 threshold determination of whether a claimant is able to perform his
11 past work. Therefore, a finding of a severe impairment simply
12 raises a *prima facie* case of disability. Further, the court
13 explained that a finding of a severe mental impairment does not lead
14 to a conclusion of a claimant's RFC, or what jobs a claimant with
15 that severe mental impairment can perform.

16 Here, Plaintiff's argument lacks merit. Hoopai demonstrates
17 that if a claimant has a mental impairment, the ALJ is not obligated
18 to include that impairment in his findings regarding the claimant's
19 RFC. Therefore, the ALJ's non-inclusion of Plaintiff's severe
20 mental impairment in his determination of Plaintiff's RFC was
21 proper.

22 As a result, the Court concludes that the ALJ did not err as
23 Plaintiff contends. Therefore, the Court RECOMMENDS that Plain-
24 tiff's Motion for Summary Judgment in this regard be DENIED and
25 Defendant's Motion for Summary Judgment in this regard be GRANTED.

VI

THE ALJ'S EVALUATION OF PLAINTIFF'S ABILITY TO PERFORM HER PAST WORK
WAS PROPER

Plaintiff argues that the ALJ failed to provide a sufficient legal basis to determine that she could return to her past work. Specifically, Plaintiff argues that her past jobs of answering service operator, customer service representative and retail cashier require constant or frequent reaching, handling, feeling, grasping and fingering, which do not comport with the ALJ's findings regarding her RFC. Defendant argues that the ALJ did not err in his evaluation that Plaintiff could perform her past work.

The ALJ specifically found:

(Plaintiff) has the (RFC) to perform light work... She can only perform frequent reaching, handling, feeling, grasping and fingering. (Tr. 625).
...(Plaintiff) was capable of performing past relevant work as an answering service operator, customer service representative, and cashier/retail. This work does not require performance of work-related activities precluded by (Plaintiff's) (RFC). (Tr. 627).

The ALJ based his conclusions on the March 21, 2006 report of Dr. Frederick W. Close (hereafter "Dr. Close"), the May 23, 2005 report of Dr. Albert Lizarraras (hereafter "Dr. Lizarraras"), and the June 17, 2002 report of Dr. Leonard Markman (hereafter "Dr. Markman"). The ALJ also based his conclusion on the Plaintiff's own reported work history and the descriptions of Plaintiff's past work as defined by the Dictionary of Occupational Titles (hereafter "DOT").

Dr. Close, an orthopedist, examined Plaintiff, reviewed Plaintiff's medical records, and opined that Plaintiff should be able to sit and stand for six hours out of an eight hour day, that

1 she can lift twenty pounds occasionally and ten pounds frequently,
2 and that she should be limited to no more than frequent reaching,
3 handling, feeling, grasping and fingering. (Tr. 584-588).

4 Dr. Lizarraras, a consultive physician, examined Plaintiff
5 and opined that Plaintiff should be able to sit and stand for six
6 hours out of an eight hour day, that she can lift twenty pounds
7 occasionally and ten pounds frequently, that she has no limitations
8 as to climbing, crouching, but limitations as to climbing ladders,
9 rope and scaffolds, and that she has no limitations as to reaching
10 in all directions including overhead, feeling, fingering, but is
11 limited to frequent handling. (Tr. 496-497).

12 Dr. Markman, a treating physician, examined Plaintiff,
13 reviewed her medical records, and opined that Plaintiff was to be
14 released to temporary light duty from June 17, 2002 through July 31,
15 2002 with the limitations of no repetitive hand motions with either
16 hand and no reaching above her shoulder with her right arm. (Tr.
17 119).

18 Plaintiff's Work History Report details her own descriptions
19 of her past work activities. As an answering service operator,
20 Plaintiff reported that she answered the telephone, took hand
21 written messages, used the computer, periodically typed orders and
22 filed. She reported that in this job, she wrote, typed and handled
23 small objects for the entire eight hours per day that she worked.
24 As a customer service representative, she reported that she made and
25 received telephone calls and used the computer. She noted that the
26 heaviest weight she lifted was less than ten pounds. As a retail
27 sales cashier, she reported that she stocked items, cleaned her work
28 area, assisted customers, operated a cash register and made popcorn.

1 This work entailed lifting clothes, putting the clothes on racks and
 2 pricing items. Plaintiff noted that in this job, she frequently
 3 lifted less than ten pounds. (Tr. 89-92).

4 Plaintiff must show that she is precluded from engaging in
 5 her past relevant work. Matthews v. Shalala, 10 F.3d 678, 680 (9th
 6 Cir. 1993). Plaintiff must show that she was unable to return to
 7 her past relevant work either as she actually performed that work or
 8 as that work is customarily performed in the national economy. Bowen
 9 v. Yuckert, 482 U.S. 137, 146, n. 5 (1987). The ALJ may use the DOT
 10 to determine a claimant's ability to perform past relevant work. 20
 11 C.F.R. §404.1560(b)(2).

12 1. Answering Service Operator

13 Plaintiff's past relevant work included performing the duties
 14 of an answering service operator. As noted above, Plaintiff
 15 reported that in this job, she answered the telephone, took hand
 16 written messages, used the computer, typed and filed. None of these
 17 duties appear to require more than frequent reaching, handling,
 18 feeling, grasping and fingering. Therefore, the ALJ's finding that
 19 she could perform the work of an answering service operator as she
 20 actually had performed that job in the past, was proper.^{1/}

21 Further, the ALJ's decision comports with the opinions of Dr.
 22 Close, Dr. Lizarraras and Dr. Markman. Dr. Close limited Plain-
 23 tiff's activity to no more than frequent reaching, handling,
 24 grasping and fingering. Dr. Lizarraras did not limit Plaintiff's

26 ^{1/} The Court notes that the DOT describes an answering service operator
 27 in the national economy as being able to reach, handle and finger
 28 constantly. DOT 235.662-026. While the ALJ may have relied on the
 DOT description, the record reflects that Plaintiff's own
 description of her past relevant work as an answering service
 operator does not suggest that she had to reach, handle and finger
 constantly, as the DOT describes.

1 reaching in all directions, feeling and fingering, but limited
2 Plaintiff to frequent handling. Dr. Markman limited, for approxi-
3 mately six weeks in 2002, Plaintiff's repetitive hand movements with
4 either hand and reaching overhead with her right arm.

5 As a result, the ALJ's determination that Plaintiff could
6 perform her past relevant work as an answering service operator as
7 she actually performed that work, was proper.

8 2. Customer Service Representative

9 Plaintiff's past relevant work included performing the duties
10 of a customer service representative. As noted above, Plaintiff
11 reported that in this job, she made and received telephone calls and
12 used the computer. None of the activities entailed in this job
13 appear to require more than frequent reaching, handling, feeling,
14 grasping and fingering.

15 Further, the DOT describes a customer service representative
16 as being able to reach, handle, feel and finger frequently. DOT
17 299.367-010. These limitations comport with the opinions of Drs.
18 Close, Lizarraras, and Markman.

19 As a result, the ALJ's determination that Plaintiff could
20 perform her past relevant work as a customer service representative
21 was proper.

22 3. Retail Sales Cashier

23 Plaintiff's past relevant work included performing the duties
24 of a retail sales cashier. As noted above, Plaintiff reported that
25 in this job, she stocked items, cleaned her work area, assisted
26 customers, operated a cash register and made popcorn. None of these
27 activities appear to require more than frequent reaching, handling,
28 feeling, grasping and fingering.

1 Further, the DOT describes a retail sales cashier as being
 2 able to reach, handle, feel and finger frequently. DOT 211.462-010.
 3 These limitations comport with the opinions of Drs. Close,
 4 Lizarraras, and Markman.

5 As a result, the ALJ's determination that Plaintiff could
 6 perform her past relevant work as a retail sales cashier was proper.

7 Therefore, the Court finds that Plaintiff has failed to show
 8 that she was precluded from engaging in her past relevant work
 9 either as she actually performed that work or as that work is
 10 customarily performed in the national economy. Consequently, the
 11 Court RECOMMENDS that Plaintiff's Motion for Summary Judgment in
 12 this regard be DENIED and Defendant's Motion for Summary Judgment in
 13 this regard be GRANTED.

14 VII

15 THE ALJ PROPERLY EVALUATED THE OPINIONS OF 16 PLAINTIFF'S TREATING PHYSICIANS

17 Plaintiff appears to argue^{2/} that the ALJ erred by failing to
 18 properly reject the opinions of Plaintiff's treating physicians.
 19 Specifically, Plaintiff appears to contend that the ALJ failed to
 20 state clear and convincing reasons for rejecting the opinions of Dr.
 21 Markman, Dr. Rakesh Patel, a public health physician, (hereafter
 22 "Dr. Patel"), and Dr. Seenu Reddy, a cardiologist, (hereafter "Dr.
 23 Reddy"). Defendant argues that the ALJ properly evaluated the
 24 opinions of these doctors.

25 An ALJ is not required to give controlling weight to the
 26 opinion of a treating physician. Batson v. Comm. of Social Security,
 27 359 F.3d 1190, 1194-1195 (9th Cir. 2004). "Although a treating

28 ^{2/}Plaintiff's arguments in this regard are unclear.

1 physician's opinion is generally afforded the greatest weight in
2 disability cases, it is not binding on the ALJ with respect to the
3 existence of an impairment or the ultimate determination of
4 disability." Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
5 2001). "The ALJ may disregard the treating physician's opinion
6 whether or not that opinion is contradicted." Magallanes v. Bowen,
7 881 F.2d 747, 751 (9th Cir. 1989).

8 When an ALJ is presented with conflicting medical opinions of
9 Plaintiff's treating physicians and the opinions of consultive
10 physicians, greater weight must be given to the opinion of the
11 treating physicians, unless the ALJ gives specific, legitimate
12 reasons for disregarding the opinion of the treating physician.
13 Batson, 359 F.3d at 1195.

14 An ALJ may discount a treating physician's opinion if it is
15 presented in the form of a check list and does not have supportive
16 objective evidence and is contradicted by other statements and
17 assessments of a claimant's medical condition. Id. at 1195, Crane v.
18 Shalala, 76 F.3d 251, 253 (9th Cir. 1996)

19 1. Dr. Markman

20 Plaintiff appears to argue that the ALJ did not offer any
21 reason for rejecting Dr. Markman's opinion that Plaintiff be
22 prohibited from bilateral repetitive hand motions and over shoulder
23 reaching with the right arm.

24 As noted in Section VI of this Report and Recommendation, Dr.
25 Markman examined Plaintiff, reviewed her medical records, and opined
26 that Plaintiff was to be released to temporary light duty from June
27 17, 2002 through July 31, 2002, with the limitations of no repeti-

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1 tive hand motions with either hand and no reaching above the
2 shoulder with her right arm. (Tr. 119).

3 Here, Plaintiff misinterprets the ALJ's opinion and the
4 evidence in the record. The ALJ specifically stated that Dr.
5 Close's and Dr. Lizarraras' opinions, (Tr. 584-588, 496-497),
6 comported with Dr. Markman's opinion. Therefore, he accorded
7 significant weight to Dr. Markman's opinion. (Tr. 626). Conse-
8 quently, the ALJ did not reject Dr. Markman's opinion. Further,
9 Plaintiff fails to mention that Dr. Markman specifically limited
10 Plaintiff's repetitive hand motions and right arm over shoulder
11 reaching from June 17, 2002 to July 31, 2002, a period of approxi-
12 mately six weeks. A six week limitation period does not signify that
13 Plaintiff was permanently limited from repetitive hand motions and
14 right arm over shoulder reaching.

15 Therefore, the Court concludes that the ALJ did not reject
16 Dr. Markman's opinion. Instead, the ALJ properly evaluated Dr.
17 Markman's opinion.

18 2. Dr. Patel

19 On April 22, 2004, Dr. Patel opined that Plaintiff could sit,
20 stand and walk for one to two hours per day, lift and carry five
21 pounds, use both of her hands for simple grasping, pushing and
22 pulling of arm controls and fine manipulation, but that she could
23 not perform work at a consistent pace for eight hours, and could not
24 complete a normal work day or work week without interruptions from
25 her physical symptoms. (Tr. 555-557). Dr. Patel's opinions noted
26 above were presented in the form of a check list.

27 On January 19, 2005, Dr. Patel opined that Plaintiff could
28 only occasionally reach, handle, finger and feel, that she was not

1 capable of performing light work on a regular and continuing basis,
2 that she had a moderately severe limitation in the ability to
3 complete a normal work day and work week without interruptions from
4 medically based symptoms, and that Plaintiff's limitations and
5 symptoms began in January 2004. (Tr. 421-424). Dr. Patel's opinions
6 noted above were presented in the form of a check list.

7 The Court notes that the ALJ's opinion does not mention Dr.
8 Patel's opinions even though the record contains Dr. Patel's
9 treatment records. (Tr. 442-492, 503-515, 558-570). However, the
10 Court's review of Dr. Patel's treatment records shows that those
11 records do not provide objective medical evidence of Plaintiff's
12 limitations that he asserted in his opinions. Therefore, any
13 failure of the ALJ to address Dr. Patel's treatment records could
14 not have affected his conclusions.

15 Moreover, Dr. Patel's opinions were presented in the form of
16 check lists that were not supported by any objective evidence and
17 were contradicted by other treating and consultive physicians'
18 statements and assessments of Plaintiff's medical condition. As a
19 result, any failure of the ALJ to address Dr. Patel's opinions could
20 not have affected his conclusions because any such unsupported check
21 list opinions may be discounted by the ALJ. Batson, 359 F.3d at
22 1195, Crane, 76 F.3d at 253.

23 Therefore, the Court can not conclude that the ALJ gave
24 specific legitimate reasons for disregarding Dr. Patel's opinions.
25 However, the Court concludes that Dr. Patel's opinions are properly
26 discounted because they are in the form of check lists and are
27 unsupported by objective medical evidence.

28

1 3. Dr. Reddy

2 On April 19, 2004, Dr. Reddy opined that Plaintiff was
3 severely limited in her ability to complete a normal work day and
4 work week with interruptions from medically based symptoms, she
5 could not sit, stand or walk for one hour per work day, she could
6 lift five pounds, she could use both of her hands for simple
7 grasping, pushing and pulling of arm controls and for fine manipula-
8 tion, and she could reach and finger occasionally.^{3/} (Tr. 230-234).
9 Dr. Reddy's opinions noted above were presented in the form of check
10 lists.

11 The ALJ specifically addressed Dr. Reddy's opinions and
12 discounted them because there was no objective medical evidence in
13 Dr. Reddy's records to support his opinions, nor any cross-refer-
14 ences or explanations as to how he arrived at his conclusions.
15 Consequently, the ALJ determined that Dr. Reddy's opinions were not
16 entitled to controlling weight and were internally inconsistent with
17 other evidence in the record. The ALJ also rejected Dr. Reddy's
18 opinions regarding Plaintiff's most severe limitations, as not
19 supported by the record. (Tr. 627).

20 The ALJ specifically and legitimately discounted Dr. Reddy's
21 opinions because Dr. Reddy's records do not provide objective
22 medical evidence of Plaintiff's limitations as asserted in his
23 opinions. Further, Dr. Reddy's opinions were properly discounted
24 because they were presented in the form of check lists that were
25 unsupported by objective evidence and were contradicted by other
26 treating and consultive physicians' statements and assessments of

27 ^{3/} Dr. Reddy's opinions are inconsistent in that he also opined that
28 Plaintiff had the unlimited ability to reach in all directions, and
unlimited ability to handle and feel. He also opined that Plaintiff
had limited ability for fine manipulation. (Tr. 233).

1 Plaintiff's limitations. Batson, 359 F.3d at 1195, Crane, 76 F. 3d
2 at 253.

3 As a result of the foregoing, the Court concludes that the
4 opinions of Plaintiff's treating physicians were properly evaluated.
5 Therefore, the Court RECOMMENDS that Plaintiff's Motion for Summary
6 Judgment in this regard be DENIED and Defendant's Motion for Summary
7 Judgment in this regard be GRANTED.

8 VIII

9 THE ALJ PROPERLY DETERMINED PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY

10 Plaintiff appears to argue that the ALJ erred in determining
11 her RFC. Specifically, Plaintiff argues that the ALJ should have
12 determined her RFC not only in terms of light work, but by a
13 function-by-function assessment. Defendant contends that the ALJ
14 did not err in determining Plaintiff's RFC.

15 It is the responsibility of the ALJ, not a claimant's
16 physician, to determine a claimant's RFC. Vertigan v. Halter, 260
17 F.3d 1044, 1049 (9th Cir. 2001). The ALJ's determination of a
18 Plaintiff's RFC must be supported by substantial evidence. Morgan v.
19 Comm. of Social Security, 169 F.3d 595, 599 (9th Cir. 1999). When
20 the ALJ determines a claimant's RFC, he must take into account those
21 limitations for which there is support in the record that do not
22 depend on the claimant's subjective complaints. If the ALJ's
23 determination of a claimant's RFC takes into account a claimant's
24 limitations which have support in the record, a function-by-function
25 analysis for medical conditions and impairments is unnecessary.
26 Bayliss v. Barnhart 427 F.3d 1211, 1217 (9th Cir. 2005).

27
28 Here, Plaintiff appears to contend that the ALJ simply

described Plaintiff's RFC in terms of the exertional category of light work. This contention lacks merit. Plaintiff fails to acknowledge that the ALJ specifically found:

After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work. *Additionally, she may use a cane, but it is not required. She can only occasionally bend, stoop, crouch, crawl, kneel and climb. She can only perform frequent reaching, handling, feeling, grasping and fingering.* (Tr. 625)(emphasis added)(citations omitted).

Further, as noted in Section VI of this Report and Recommendation, the ALJ's determination of Plaintiff's RFC was based on Plaintiff's own reported work history and on the opinions of Dr. Close, Dr. Lizarraras, and Dr. Markman. Therefore, the Court concludes that there was substantial evidence in the record upon which the ALJ determined Plaintiff's RFC. As a result, a function-by-function analysis was unnecessary. *Id.* at 1217.

Consequently, the Court concludes that the ALJ properly determined Plaintiff's RFC. Therefore, the Court RECOMMENDS that Plaintiff's Motion for Summary Judgment in this regard be DENIED and Defendant's Motion for Summary Judgment in this regard be GRANTED.

IX

PLAINTIFF'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Plaintiff argues that her due process rights were violated when the ALJ refused to reopen her prior application for disability benefits. Plaintiff also argues that her due process rights were violated because the ALJ predetermined the outcome of the December 2008 hearing before the hearing was held. Defendant contends that both of Plaintiff's contentions lack merit.

1. ALJ Decision To Not Reopen Plaintiff's Prior Application

1 On April 22, 2008, the District Court remanded this case to
 2 the ALJ because the ALJ failed to consider whether, between January
 3 3, 2003 and March 9, 2003, Plaintiff was incapable of pursuing her
 4 administrative remedies to reopen her case, due to her memory
 5 problems.^{4/} On December 1, 2008, the ALJ held a hearing in this case
 6 pursuant to the District Court's remand. On January 15, 2009, the
 7 ALJ issued a decision. In the decision, the ALJ stated in pertinent
 8 part as follows:

9 1. He reviewed all of the evidence in the record related to
 10 Plaintiff's prior filings and the prior decisions through the date
 11 of the first hearing prior to his scheduling the second hearing.
 12 (Tr. 620).

13 2. At the first hearing, he asked Plaintiff's counsel about
 14 the 2003 Kaiser records that indicated white matter in Plaintiff's
 15 brain and an MRI. (Tr. 620).

16 3. Plaintiff had been referred for consultive examinations,
 17 but she did not attend them. She did not provide a valid reason for
 18 not attending the consultive examinations, except for stating that
 19 her counsel advised her not to attend the consultive examinations.
 20 (Tr. 620).

21 4. Plaintiff's counsel admitted that Plaintiff had not begun
 22 to see a psychiatrist when a consultive examination was ordered, "so
 23 our case was not to be built or premised on her mental disorder...
 24 We don't have any documentation of it [extreme depression], although
 25 she has some symptoms of it, but no new documentations (sic), so we
 26 are not forwarding that as an impairment." (Tr. 620) (citations
 27 omitted).

28 5. He gave significant weight to the Commissioner's argument
 that Plaintiff failed to adduce any medical evidence that she had
 disabling dementia from January through March 2003 which prevented
 her from pursuing her administrative options. (Tr. 620).

^{4/} The District Court noted that on September 5, 2002, Defendant denied Plaintiff's initial application for disability benefits. On November 24, 2002, Plaintiff filed a "Request for Rehearing" form, which Defendant interpreted as a request for reconsideration of his initial denial. On January 3, 2003, Defendant sent to Plaintiff a "Notice of Reconsideration," which stated that Plaintiff's reconsidered claim was denied and that Plaintiff had 60 days to request a rehearing before an ALJ. On December 9, 2003, Plaintiff obtained counsel. On January 6, 2004, Plaintiff filed a request for hearing before an ALJ. On February 1, 2005, an ALJ dismissed Plaintiff's request for a hearing as untimely by 303 days.

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2 6. He noted that pursuant to case law, Plaintiff must show
3 that her allegation of mental impairment which precluded her from
4 pursuing administrative or judicial remedies "must be substantiated,
5 and courts have held that claimants succeed in vaulting the
6 'colorable claim' (of violation of due process rights) hurdle when
7 they adduce evidence tending to show not only that they suffered at
8 the relevant time from a mental impairment or condition, but also
9 that the impairment or condition affected their ability to under-
10 stand and/or pursue appeal rights." (Tr. 620)(emphasis in origi-
11 nal)(citations omitted).

12 7. Plaintiff did not show that she suffered a mental
13 impairment or condition (during) the relevant time and that any such
14 impairment or condition affected her ability to understand and/or
15 pursue her appeal rights. (Tr. 620).

16 8. His review of Plaintiff's medical records reveal that the
17 brain MRIs of March 20, 2003 show only a minimal amount of deep
18 white matter change. A follow-up brain MRI taken on August 12, 2003
19 demonstrated additional change "greater than expected for age with
20 allegations of short term memory loss and worsening gait." The
21 August 2003 MRI was not taken until almost six months after the
22 deadline for Plaintiff to request a hearing. (Tr. 620-621).

23 9. He considered and gave significant weight to the January
24 27, 2003 neurological consultation evaluation of Dr. Mazaira, which
25 concluded that Plaintiff's memory problems were subjective. (Tr.
26 621).

27 10. He found that there was not reasonable substantiated
28 evidence to establish a colorable constitutional claim and that
Plaintiff's first application should not be reopened as there is no
good cause established for the late filing. (Tr. 621).

Here, it is clear that the ALJ reviewed all of the evidence
in the record pertaining to Plaintiff's mental condition between
January 3, 2003 and March 9, 2003. That evidence indicated that
Plaintiff's mental condition during that time period did not show
that Plaintiff suffered from a mental impairment or condition that
affected her ability to pursue her administrative appeal rights.
Therefore, the ALJ so concluded. His conclusion was supported by
Dr. Mazaira's January 27, 2003 neurological consultation evaluation,
which concluded that Plaintiff's memory problems were subjective.
As a result, the ALJ concluded that the evidence in the record for

1 the relevant time period did not establish good cause to reopen
2 Plaintiff's first application for disability benefits. Further, the
3 ALJ noted that at Plaintiff's first hearing, Plaintiff's counsel
4 explicitly stated that Plaintiff's claim was not based on a mental
5 impairment. Therefore, it is reasonable to conclude that the ALJ
6 did not review evidence in the record that existed at the time of
7 the first hearing that pertained to Plaintiff's mental impairment.

8 The Court finds that the ALJ's decision finding no good cause
9 to reopen Plaintiff's first application for disability benefits was
10 proper. The Court RECOMMENDS that Plaintiff's Motion for Summary
11 Judgment in this regard be DENIED and Defendant's Motion for Summary
12 Judgment in this regard be GRANTED.

13 2. December 2008 Hearing

14 Plaintiff claims that at the December 2008 hearing, the ALJ
15 violated her due process rights because he made his decision before
16 conducting the hearing. Plaintiff alleges that the ALJ's statements
17 at the hearing were argumentative and did not indicate an interest
18 in reviewing the record or the issues presented.

19 A claimant's allegation that the ALJ "prejudged his case in
20 some way," is insufficient to show a violation of due process.
21 Valentine v. Comm. of Social Security, 574 F.3d 685, 690 (9th Cir.
22 2009). Instead, a claimant must show that the "ALJ's behavior, in
23 the context of the whole case, was 'so extreme as to display clear
24 inability to render fair judgment.'" Rollins v. Massanari, 261 F.3d
25 853, 858 (9th Cir. 2001)[quoting Liteky v. USA, 510 U.S. 540, 551
26 (1994)].

27
28 Review of the transcript of the December 2008 hearing

1 indicates that the ALJ may have been impatient, dissatisfied and
 2 annoyed.^{5/} However, "expressions of impatience, dissatisfaction,
 3 annoyance, and even anger, that are within the bounds of what
 4 imperfect men and women... sometimes display," do not establish (an
 5 ALJ's) bias or prejudice. Rollins, 261 F.3d at 858, citing Liteky,
 6 510 U.S. 540, 555-556. Nor does Plaintiff show that the ALJ's
 7 behavior, in the context of the whole case, was so extreme as to
 8 display clear inability to render fair judgment. Plaintiff fails to
 9 indicate what statements made by the ALJ were argumentative or that
 10 show that the ALJ was disinterested in the reviewing the record or
 11 the issues presented. In fact, the contrary appears true. In this
 12 case, the ALJ reviewed all of the evidence in the record not only
 13 once, but twice. After reviewing the evidence, the ALJ issued two

15 ^{5/} The following pertinent exchanges took place at the December 2008
 16 hearing:

16 Plaintiff's Attorney: Okay, your honor, I direct the court's attention to
 B1F-18.

17 ALJ: Let's try it again, Ms. Mitchell. You invite my attention to what,
 B1F-18.

... (cont'd)

18 ALJ: It's always a good thing to remember in courts to invite a court's
 attention not to direct them.

(Tr. 705).

...

20 ALJ: ... (The evidence is) either here or it isn't here. You're not
 going to manufacture new evidence to go back five, to five years ago
 because that just not, it's not applicable. We're talking about
 21 that period that they say for me to go there and that's why I said
 direction for me to do it. I'm just affording you if you have
 anything or want to, to do so for that period January of 2003 to
 22 February 2, 2005, and I'm not trying to put you on the spot or under
 the gun. I'm just affording you that opportunity for the hearing
 23 consistent with the language in the remand. (Tr. 712).

...

24 Plaintiff's Attorney: ... Well, your honor, if it would please the court
 if I could have some exhibits to invite your attention to as you
 25 make your decision. Because there's no point in holding you up.

26 ALJ: Well, that's basically all I say I can do because the evidence is
 there or it isn't there- ... --and if it wasn't there (sic) you
 would have presented it to me which you haven't done because it is
 27 there and the direction is for me to reassess it and rewrite it and
 apply whether or not, well, I've given the direction earlier, I
 won't repeat them within the remand here, and to do so and make the
 28 subsequent and then write it... (Tr. 713).

1 decisions which were amply supported by evidence in the record.
2 Additionally, the ALJ applied the correct legal standards to the
3 issues presented, but may have become frustrated by Plaintiff's
4 counsel's statements and representations made at both hearings. As
5 a result, the Court can not conclude that the ALJ prejudged
6 Plaintiff's case or that his behavior was so extreme as to display
7 clear inability to render fair judgment.

8 Therefore, the Court RECOMMENDS that Plaintiff's Motion for
9 Summary Judgment in this regard be DENIED and Defendant's Motion for
10 Summary Judgment in this regard be GRANTED.

11 X

12 CONCLUSION AND RECOMMENDATION

13 After a review of the record in this matter, the undersigned
14 Magistrate Judge recommends that Plaintiff's Motion for Summary
15 Judgment be DENIED and Defendant's Motion for Summary Judgment be
16 GRANTED.

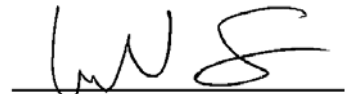
17 This report and recommendation of the undersigned Magistrate
18 Judge is submitted to the United States District Judge assigned to
19 this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

20 **IT IS ORDERED** that no later than July 15, 2010, any party to
21 this action may file written objections with the Court and serve a
22 copy on all parties. The document should be captioned "Objections
23 to Report and Recommendation."

24 **IT IS FURTHER ORDERED** that any reply to the objections shall
25 be filed with the Court and served on all parties no later than
26 July 30, 2010. The parties are advised that failure to file
27 objections within the specified time may waive the right to raise
28 those objections on appeal of the Court's order. Martinez v. Ylst,

1 951 F.2d 1153 (9th Cir. 1991).

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4 DATED: June 15, 2010

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7 Hon. William V. Gallo
8 U.S. Magistrate Judge
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